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ALEXANDER L. STEVAS,
CLERK

No. 80-1388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD D. DOWE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Should a Federal prosecutor be required to abide by a plea bargain offer made to, and accepted by, a defendant, as the Fourth Circuit ruled in *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979); or is there no Fifth and Sixth Amendment prohibition against the withdrawal by a prosecutor of an already accepted plea agreement, as the Third Circuit ruled in *Government of Virgin Islands* v. *Scotland*, 614 F.2d 360 (3rd Cir. 1980)?

2. Should a Federal prosecutor be required to abide by a plea bargain offer made to a defendant, who has accepted the offer and complied with some of the conditions required by the plea bargain to his detriment, when that prosecutor later seeks to withdraw the plea bargain offer prior to the actual entry of the defendant's plea?

3. Whether a Federal trial judge, in contravention of the holding of *United States* v. *Coplon*, 185 F.2d 629 (2nd Cir. 1950), can refuse to let the defense see relevant documents which were presented by the prosecutor, and read *in camera* by the judge, and upon which in part the judge subsequently based his findings that "extenuating circumstances" existed which justified the prosecutor in revoking a plea offer previously accepted and partially performed by the defendant?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the District of Columbia (Aubrey E. Robinson, Jr., Judge) dated May 23, 1979, denying defendant's motion to enforce plea bargain, are unreported and appear herein as Appendix A, page 1a.

The Judgment Order of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court, is unreported, and appears herein as Appendix B, page 6a.

The motion to extend time to file petition for rehearing, granted by the United States Court of Appeals for the District of Columbia Circuit on November 25, 1980,

is unreported and appears herein as Appendix C, page 8a.

The Petition for Rehearing, filed by the appellant Clifford D. Dowe, in the United States Court of Appeals for the District of Columbia Circuit appears herein as Appendix D, page 10a.

The Order of the United States Court of Appeals for the District of Columbia Circuit, dated December 4, 1980, recalling the mandate is unreported and appears herein as Appendix E, page 14a.

The Order of the United States Court of Appeals for the District of Columbia Circuit denying the petition for rehearing, dated December 19, 1980, is unreported, and appears herein as Appendix F, page 15a.

JURISDICTION

The judgment of the United States Court of Appeals, affirming the Order of the United States District Court for the District of Columbia, and for which certiorari is sought, was entered on October 22, 1980 (Appendix B, page 6a). The Court extended until November 27, 1980, the time within which petitioner could file a petition for rehearing (Appendix C, page 8a). The petition for rehearing was timely filed, on November 26, 1980 and was denied by an order dated December 19, 1980 (Appendix F, page 15a). The instant petition is being filed within sixty days of December 19, 1980, the date of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments Five and Six of the United States Constitution, and 21 U.S.C. § 841(a) are set forth herein as Appendix G, page 16a.

STATEMENT OF THE CASE

This case presents an important question, about which there exists a split of authority within the Circuit Courts of Appeal, involving the obligation of prosecutors to abide by and perform plea bargain agreements they enter into with defendants. This split of authority exists over whether such agreements must be enforced at the point where (a) the plea offer is made and agreed to by the defendant; or at a later point where (b) the defendant has acted to his detriment in reliance on the offer; or at an even later point where (c) the defendant has actually entered his guilty plea in reliance on the plea agreement. Equally important, and related to the foregoing issues, is the question whether a trial judge, at a hearing on a motion to enforce the plea bargain, may properly receive and consider documents *in camera*, presented by the prosecution in support of its claim that newly discovered "extenuating circumstances" justify withdrawing a plea offer previously accepted, when the trial judge then refused the request of the defense to see those documents in order to be able to rebut such prosecutorial claims.

The context in which these issues are presented arose when Clifford Dowe was charged and indicted for the felony of possession of four ounces of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a).[1]

Ongoing discussions between an Assistant United States Attorney assigned to the case and Mr. Dowe's counsel culminated in a plea agreement offer to Mr. Dowe, communicated through his attorney, to plead guilty to a single misdemeanor count. The offered plea

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[1] Dowe was also charged with D.C. Code misdemeanor offenses of possession of cocaine (33 D.C. Code § 402), and possession of miniscule amounts of marijuana and hashish found in his wife's dresser drawer (33 D.C. Code § 402).

bargain required Mr. Dowe to do three things in exchange for the misdemeanor disposition: (a) name his source for the cocaine; (b) make a controlled purchase of narcotics from either his supplier or any other person similarly situated, in cooperation with narcotics' squad detectives, in order that they could secure a search or arrest warrant; and (c) commit himself to testify before the grand jury. That plea bargain offer was made on December 27, 1978.

Thereafter, Mr. Dowe and his counsel met with the prosecutor and two Metropolitan Police detectives at the prosecutor's office on January 2, 1979. There, Mr. Dowe accepted the tendered plea bargain and agreed to plead guilty to a misdemeanor, as well as comply with the three requirements.

Once the plea agreement had been made, Mr. Dowe identified his source in New York. At a meeting in the prosecutor's office, he answered questions put to him by both the prosecutor and two police detectives. He fully admitted his guilt to the pending cocaine charge, and identified documents seized from his home, explaining their meaning and purpose.

The questioning continued until late afternoon. The prosecutor advised Mr. Dowe that the grand jury had recessed for the day, and Mr. Dowe agreed to go before the grand jury at any time the prosecutor selected.

The meeting adjourned with the understanding that Mr. Dowe would have thirty (30) days within which to go before the grand jury and to participate in setting up the controlled buy of illicit narcotics as required by the tendered and accepted plea bargain.

Then, on January 5, 1979, the prosecutor notified defense counsel and the District Court judge at a status hearing that the plea bargain was to be withdrawn. It was later withdrawn by letter dated January 8, 1979.

On February 16, 1979, Mr. Dowe filed a motion to dismiss the indictment or alternatively, to enforce the plea bargain. A hearing was held on that motion on February 23, 1979.

At the hearing, the prosecutor sought to justify his abrogation of the plea agreement previously entered into, and partially performed by Mr. Dowe, on the ground that some anonymous law enforcement official had told one of the detectives who was at the January 2, 1979 meeting, that Mr. Dowe was allegedly involved, some years earlier, in some unspecified connection with drugs.

However, this detective claimed to have had that same information prior to, and at the time of, his participation in the formulation and offering of the plea agreement by the prosecutor which was accepted by Mr. Dowe on January 2, 1979.

During the hearing on the motion to enforce plea bargain, neither the prosecutor nor the detective, when called to testify, would disclose the source of the information, the details or the nature of the information, or the name or agency of the other "law enforcement official" who supposedly supplied such information about Mr. Dowe's previous activities.

Over repeated defense objections, the District Court judge received, *in camera*, the extensive written notes of both the detective and the prosecutor which purported to be notes made during their separate discussions with the unidentified official of an unidentified law enforcement agency. The judge refused to permit the defense to see the documents in spite of repeated requests, and repeated objections to such a procedure.

Three months later, on May 23, 1979, the District Court judge issued his ruling denying the motion to enforce the plea bargain. In his written findings, it was clear that the judge relied extensively on the *in camera*

documents, to which the defense was denied access and the opportunity to rebut. The District Court judge found that there had been a plea agreement offered and accepted by the defendant. The judge treated the partial performance of the plea agreement by Mr. Dowe as insufficient in the court's view of the law, for the court to compel the government to perform its part of the plea bargain. The court also (erroneously, so Mr. Dowe claims) concluded that the partial performance of the plea agreement by Mr. Dowe was not "detrimental" to Mr. Dowe. Finally, the court concluded that the information supplied by someone, all as disclosed by the *in camera* documents, constituted an extenuating circumstance justifying revocation of the plea agreement.

On November 9, 1979, Mr. Dowe waived jury trial, and was tried and convicted by the Court of the felony charge and two of the misdemeanor charges, and on January 25, 1980, Mr. Dowe was sentenced to a term of three years in prison, with a special parole term of three years.

REASONS FOR GRANTING THE WRIT

A split of authority in the Circuit Courts of Appeals has created uncertainty in the law regarding plea bargaining in Federal criminal cases. This uncertainty should be resolved by the United States Supreme Court in order that prosecutors and defendants alike may engage in the plea bargaining process with certainty.

Here, we are dealing with a defendants' agreement to plead guilty in accordance with the government's plea offer. As Judge Gibbons put it for the Third Circuit in *Government of Virgin Islands* v. *Scotland*, 614 F.2d 360 362 (1980):

> We are presented with the question of whether a defendant's agreement to plead guilty in accordance with the government's initial offer gives the defend-

ant a right to specific performance of the terms of that offer. The Fourth Circuit recently answered this question in the affirmative in *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979). We decline to follow the Cooper rationale.

In the instant case, a plea offer was made to Clifford Dowe, and required Dowe to do three things as part of the bargain. Dowe unequivocally accepted that offer, and thereafter completed one of the three requirements. His appearance before the Grand Jury was within the control of the prosecutor, not Dowe. His cooperation with the police to participate in a controlled buy was within the control of the police, not Dowe.

The Fourth Circuit, in *Cooper*, *supra*, relied on *Santobello* v. *New York*, 404 U.S. 257 (1971), in locating the core concept of the defendant's constitutional right to be treated with "fairness". Enlarging on that principle, the Fourth Circuit found a Fifth Amendment guarantee of substantive due process and a Sixth Amendment guarantee of effective assistance of counsel merged to justify enforcement of plea agreements entered into by a prosecutor.

The Third Circuit, in *Government of Virgin Islands* v. *Scotland*, *supra* found the facts in that case to be a stronger basis for ordering specific performance than existed in *Cooper*, because Scotland had accepted the plea offer prior to the government's withdrawal. Nevertheless, the Third Circuit declined to follow *Cooper*.

The Third Circuit, in *Government of Virgin Islands* v. *Scotland*, however, reached back to *Santobello* to conclude that where a defendant detrimentally relies on the government's promise, the due process guarantees bring into play a basic estoppel principle. Therefore, reasoned the Court, where a defendant had not yet entered his plea, but had relied on the bargain in such a way that a fair trial would no longer be possible, the gov-

ernment would be required to perform the plea agreement. Here, Clifford Dowe did indeed rely on the bargain, and not only named his source, but waived his Fifth Amendment rights in connection with the lengthy questioning by both police and prosecutors. In making numerous incriminating statements, and identifying and explaining documents seized from his home, Dowe had relied on the plea bargain to his detriment to the point that a fair trial was then jeopardized.

The District Court in the instant case misread *Cooper* in denying specific performance of the plea bargain. In *Cooper*, the Court held that where extenuating circumstances affecting the propriety of the plea proposal offered by the prosecutor, and which were unknown to and not reasonably discoverable by the government when the plea offer was made, come to light in the interval between the government offer and acceptance by the defendant, the offer may be withdrawn. The *Cooper* Court holds however that once an offer has been made, and the acceptance of that offer within a reasonable time occurs, the government must be bound by its bargain.

Although there exists a split of authority in the Circuits, under either rationale Dowe was entitled to enforcement of the plea agreement. No alleged information came to the prosecutor's attention in the interval between the plea offered on December 27, 1978 and its unequivocal acceptance on January 2, 1979. Moreover, the claimed information was known to the police involved in the plea offer negotiations, and in any event, the information was reasonably discoverable long before January 2, 1979.

A second issue exists for granting the writ. In *United States* v. *Coplon*, 185 F.2d 629 (2nd Cir. 1950), Chief Judge Learned Hand located a violation of the Sixth Amendment guarantee of the right to confront witnesses when a trial judge received, *in camera*, written sum-

maries of telephone calls offered by the prosecution, examined and relied on them, and refused to allow the defense to see them. Here, the District Court judge did exactly the same thing. He accepted *in camera* summaries of telephone calls to police and prosecutors. Those documents, which contained information which was not allowed to be brought out by cross-examination of the police and prosecutors when they testified, were denied to the defense, and thereafter relied on by the Court in its May 23rd decision.

The viability of the *Coplon* decision, and the extent of its application to various stages of pre-trial and trial proceedings is an important issue that deserves consideration by the United States Supreme Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully suggested that certiorari be granted, that the judgment of the Court of Appeals be reversed, and that Judge Robinson be directed to order the government to abide by its original plea agreement. Alternatively, Judge Robinson should be directed to reopen the hearing on the motion to enforce the plea bargain, make available to the defendant the *in camera* documents, and allow the defendant to produce evidence to rebut matters contained in those documents.

Respectfully submitted,

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Attorney for Petitioner

Appendices

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 78-0642

UNITED STATES OF AMERICA,
Plaintiff

v.

CLIFFORD DOWE,
Defendant

[Filed May 23, 1979]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Defendant, Clifford D. Dowe, was arrested on September 28, 1978, upon the execution of a search warrant at his residence, 4843-16th Street, N.W., Washington, D.C., and the discovery of cocaine. He was subsequently indicted and charged with a single felony court of possession with intent to distribute cocaine and three misdemeanor counts charging separately possession of cocaine, marijuana and hashish. Through his counsel, Charles W. Halleck, the Defendant has moved for an order either to dismiss the indictment or require the Government to perform a plea bargain. Upon consideration of the Motion to Dismiss the Indictment or Alternatively Enforce Plea Bargain, the Points and Authorities filed in support thereof and in opposition thereto, the evidence received at hearing and argument of counsel, the Court finds facts as follows:

1.) At Defendant's scheduled preliminary hearing on October 19, 1978, Charles Halleck appeared for him and Assistant United States Attorney Howard L. Cushenberry, then assigned to the Grand Jury Section, appeared

for the United States. Defendant, through counsel, waived the preliminary hearing and immediately thereafter his Counsel discussed the case with the Assistant United States Attorney. Those discussions included a possible plea arrangement. Defense Counsel sought a misdemeanor disposition. The prosecutor indicated that he would explore that possibility if the Defendant would work with the Government and provide the Government with the name of his source. By agreement the time for indictment was extended for thirty (30) days to permit Defendant to consider the possible disposition and the Assistant U.S. Attorney to confer with his supervisor, Assistant United States Attorney Charles Roistacher, Chief of the Grand Jury Section. Two days before the expiration of the thirty (30) day period, Defense Counsel advised Cushenberry that the Defendant had not made up his mind as to whether he would cooperate. After the expiration of the thirty (30) day period, the Defendant was indicted on November 28, 1978, the Government not having been advised of his willingness to cooperate.

2.) On October 28, 1978, Roistacher wrote a memo to the Dowe file as follows:

> "To: Preliminary Hearing Assistant
>
> From: CHR
>
> 1. Reference to Dowe:
>
> As per prior discussion between HLC and CHR, no matter what this defendant does, he can't have a misdemeanor but his cooperation will be related to Court."

3.) Following indictement, Cushenberry had no further discussions with Halleck concerning Dowe's case. Halleck was advised to contact Assistant United States Attorney David Krakoff, the Assistant to whom the case had been assigned for trial. By telephone on December 4, 1978,

Halleck inquired of Krakoff whether Defendant could plead to a misdemeanor in exchange for giving the name of his supplier. Krakoff said he would have to check into the matter. On December 27, 1978, Krakoff communicated to Halleck the Government's offer to permit a misdemeanor plea if Defendant made a controlled purchase of narcotics from his supplier or any other person similarly situated in order to secure a search or arrest warrant and further committed himself to testify before the Grand Jury. In that same telephone conversation, Halleck agreed to meet in Krakoff's office on January 2, 1979, with the defendant to continue plea discussions.

4.) On January 2, 1979, the agreed upon meeting was held The Defendant, Halleck, Krakoff and two Metropolitan Police officers, Sgt. Raymond Gonzales and Detective John Centrella were present. After being advised that nothing he said could be used against him, the Defendant responded to questions about his involvement in illicit narcotics. He named an "Ed Greene" as the alleged source from whom he obtained the cocaine which is involved in the indictment. He declared that this was his only acquisition of illicit narcotics; that it was for his personal use; and that he didn't know anyone anywhere except his alleged source in New York from whom illicit narcotics could be obtained and thus could not provide assistance to the officers by a controlled buy. The police officers, referring to documents seized in his home, sought to dispute his lack of knowledge about illegal drug traffic in the Metropolitan Washington area. He was willing at this time to go before the Grand Jury. The January 2, 1979, meeting adjourned with the understanding that Defendant would have thirty (30) days to do the following in order to plead to a misdemeanor:

a) Participate in setting up a controlled buy of illicit narcotics in the Metropolitan Washington area from someone who distributed quantities of illicit

hard drugs comparable to that of his alleged New York source.

b) Appear before the Grand Jury.

5.) On January 4, 1979, Krakoff was informed by Detective Centrella that further checking by him with other law enforcement officers revealed information then unknown about Defendant's contacts with narcotics. Krakoff verified Centrella's information by conferring directly with the other law enforcement officials. This discrepancy between the information and that received from Defendant about his involvement with narcotics led to a determination by the United States Attorney's Office that a misdemeanor disposition would not be available to Defendant. This conclusion was disclosed to Defendant and his counsel on January 5, 1979, at the status hearing before this Court.

6.) Defendant had taken no further action in performance of the plea agreement between January 2, 1979, and its withdrawal by the Government on January 5, 1979.

CONCLUSIONS OF LAW

1.) Assistant United States Attorney David Krakoff extended a formal plea offer to the Defendant's attorney on December 27, 1978, and reiterated its terms to the Defendant and his attorney on January 2, 1979.

2.) Before Krakoff revoked the plea offer on January 5, 1979, Defendant had done nothing to perform his obligations under the offer such as would compel this Court to order the Government to either perform the plea bargain or dismiss the indictment. *See United States* v. *Carter*, 454 F.2d 426, 427-28 (4th Cir. 1972); *United States* v. *Paiva*, 294 F. Supp. 742, 747 (D.D.C. 1969).

3.) Before Krakoff revoked the plea offer on January 5, 1979, the defendant had done nothing to his detriment in reliance on the plea offer that would compel this Court to order the Government to either perform the plea bargain or dismiss the indictment. *See United States* v. *Carter*, 454 F.2d at 427-28; *United States* v. *Paiva*, 294 F. Supp. at 747.

4.) The discovery by the United States Attorney's Office on January 4, 1979, of information not previously known to it concerning Defendant's contact with narcotics that was directly contrary to Defendant's representations was an extenuating circumstance justifying Krakoff's revocation of the offer on January 5, 1979, within the meaning of *Cooper* v. *United States*, No. 77-2288, slip op. at 18 (4th Cir., March 5, 1979).

Based upon the foregoing, it is by the Court this 23rd day of May, 1979,

ORDERED, that Defendant's Motion to Dismiss the Indictment or Alternatively Enforce Plea Bargain be and hereby is DENIED.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Criminal No. 78-00642
No. 80-1129

UNITED STATES OF AMERICA,

v.

CLIFFORD D. DOWE

Appellant

Appeal from the United States District Court for the District of Columbia

[Filed Oct. 22, 1980]

Before: TAMM and ROBINSON, Circuit Judges and WOOD*, Circuit Judge, United States Court of Appeals for the Seventh Circuit

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

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* Sitting by designation pursuant to 28 U.S.C.§ 291(a).

The duty of counsel to furnish effective representation does not require the filing of a suggestion for rehearing *en banc*, unless the case meets the rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1129

CLIFFORD D. DOWE
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

[Filed Nov. 17, 1980]

MOTION TO EXTEND TIME WITHIN WHICH TO FILE PETITION FOR REHEARING

Appellant, through counsel, hereby moves this Court to extend the time for filing a Petition for Rehearing, under Rule 40, Federal Rules of Appellate Procedure, to and including November 27, 1980. As reason therefore, counsel states that the certified mail letter containing the copy of this Court's Judgment affirming the District Court's judgment was not received through the U.S. mail, until Wednesday, November 12, 1980. The envelope bears no postmark.

Consequently, since the Judgment was filed on October 22, 1980, time for filing a Petition under Rule 40 had expired before either appellant or his counsel was ever aware that the appeal had been decided. Counsel must have an opportunity to consult with appellant and determine if a Petition for Rehearing is to be filed. Hence, the requested extension of time herein seeks the 14 days allowed by Rule 40 from the date of actual notice and receipt by appellant's counsel of a copy of the unpublished Judgment Order.

The Appellate Division of the U.S. Attorney's Office has been contacted, and they do not object to the extension of time herein requested.

Respectfully submitted,

/s/ Charles W. Halleck
CHARLES W. HALLECK
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Extend Time Within Which to File Petition for Rehearing was mailed to John Terry, U.S. Attorney's Office, Courthouse, Washington, D.C. 20001 this 14th day of November, 1980.

/s/ Charles W. Halleck
CHARLES W. HALLECK

[MOTION GRANTED
/s/ George A. Fisher
GEORGE A. FISHER, Clerk]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1129

CLIFFORD D. DOWE
Appellant,

vs.

UNITED STATES OF AMERICA
Appellee.

PETITION FOR REHEARING

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ARGUMENT

Appellant, Clifford Dowe, by counsel, petitions this Court for rehearing and reconsideration of its judgment order affirming the District Court's denial of his Motion to enforce a plea bargain.

Two reasons are present for rehearing. First, appellant argued, and the prosecution agreed, that in the event there had been detrimental reliance by the defendant on the plea bargain, the government must abide by its offer. (Appellee's brief, pp. 20-21). In this case, the facts show that appellant Dowe disclosed the name of his source, and thereafter answered extensive questions by the prosecution and police. In addition, Dowe agreed to go before the Grand Jury, and to assist in a controlled buy.

Indeed, so there could be no question, the trial court finally found that there had been a plea bargain, or a "deal", struck between the prosecution and Dowe. At page 69 of the transcript, the Court said:

> I am talking about the fact that you can't walk out of a deal without some legitimate reason. There has got to be a reason.

The trial court found, beyond doubt, that an agreement was made. An offer of a misdemeanor plea was made, and accepted. Thereafter, appellant Dowe began doing those things he was required to do. He partially performed, and stood ready and willing to complete the remaining requirements.

What this court's unpublished order does is to leave completely unclear whether a partial performance, in detrimental reliance, by a defendant who has a plea bargain, is or is not sufficient to invoke the rule recognized by the government at pages 20 and 21 of its brief. Appellant respectfully suggests that the answer to that

question is critical not only to him, but to all other defendants who may be similarly situated in the future. The question, then, is whether all requested terms of a plea bargain must be finally completed by a defendant before he can be sure the prosecution cannot change its mind. If such a stringent rule is to be set forth, then both Dowe and others to follow should know that partial performance, in the most serious detrimental reliance on the plea agreement, will not protect defendants from a subsequent withdrawal of the plea agreement. The issue is one of substantial importance in this Circuit, and for that reason, appellant requests rehearing.

Second, appellant requests rehearing on the issue addressed in *United States* v. *Coplon*, 185 F.2d 629 (2d Cir. 1950). That case held that it was clear error for a trial judge to accept and rely on documents tendered by the prosecution, but never shown to the defendant.

Here, the most critical part of this case was the hearing on the Motion to Enforce Plea Bargain. Here, without question, the prosecutor tendered documents to the trial court during the hearing, and in spite of the defense requests, repeated on several occasions, the trial court refused to allow the defense to see the documents. The trial judge relied on those documents in making his ruling.

The importance of this question is pointed up by the trial court's announcement, quoted *supra*, that the prosecutor could not walk out of a deal without some legitimate reason. The reason, apparently supported by the documents in question, was a second-hand hearsay allegation that Dowe was involved in some other unspecified drug law violations. Those allegations by nameless, faceless drug agents or officials were apparently devastating. Defendant Dowe, whose prior record was clean, was denied the ability to rebut or defend against those allegations. Had Dowe been allowed to see the documents

which the Court saw and relied upon, he could have effectively countered those charges by testimony of either himself or other witnesses.

Here, the question of the viability of the *Coplon* decision in this Circuit is of major importance both to Dowe and to District Court judges and defendants who may in the future face the same situation. Must such documents, presented by the prosecutor to the Court, be made available to the defense? *Coplon* says "Yes". This court's judgment orders seems to say "No". The issue is of great enough importance to require rehearing and a guiding exposition of the issue by this Court.

For the foregoing two reasons, appellant Dowe respectfully requests rehearing on this appeal.

/s/ Charles W. Halleck (rcb)
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(202) 331-0022

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Rehearing was mailed, this 25th day of November, 1980, to John Terry, Esq., Assistant U.S. Attorney, U.S. Courthouse, Washington, D.C.

/s/ Charles W. Halleck (rcb)
CHARLES W. HALLECK

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Criminal No. 78-00642

No. 80-1129

UNITED STATES OF AMERICA

v.

CLIFFORD D. DOWE,

Appellant

[Filed Dec. 4, 1980]

ORDER

It appearing that the mandate in this case issued on November 14, 1980 and that, thereafter, this Court enlarged the time within which a petition for rehearing could be filed, and it further appearing that appellant has, in fact, filed such a petition for rehearing and that petition is presently under consideration by the Court, and upon consideration of appellant's motion to recall mandate, it is

ORDERED, that appellant's motion to recall mandate is granted and the Clerk of the District Court is directed to return forthwith the mandate previously issued in this case.

FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Criminal 78-00642

No. 80-1129

UNITED STATES OF AMERICA

v.

CLIFFORD D. DOWE,

Appellant

Before: Tamm and Robinson, Circuit Judges; and Wood *, Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit

[Filed Dec. 19, 1980]

ORDER

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition is denied.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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* Sitting by designation pursuant to Title 28 U.S. Code Section 291(a).

APPENDIX G

Amendment 5, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S. Code, § 841(a):

> **§ 841. Prohibited acts A—Unlawful acts**
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

No. 80-1388

MAR 24 1981

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD D. DOWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioner's motion to enforce a plea offer.

2. Whether the district court abused its discretion by reviewing certain materials *in camera*.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1980. A petition for rehearing was denied on December 19, 1980 (Pet. App. 15a). The petition for a writ of certiorari was filed on February 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a bench trial in the United States District Court for the District of Columbia, petitioner was convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a); possessing marijuana, in violation of D.C. Code Ann. § 33-402 (1973); and possessing hashish, in violation of D.C. Code Ann. § 33-402.

Petitioner was sentenced to three years' imprisonment and a special parole term of three years for the conviction on the cocaine charge, and received concurrent one-year terms of imprisonment on the marijuana and hashish counts. The court of appeals summarily affirmed (Pet. App. 6a-7a).

On September 28, 1978, officers of the D.C. Metropolitan Police Department executed a search warrant at petitioner's residence and discovered a plastic bag containing approximately four ounces of cocaine with an estimated street value of $10,000, a quantity of marijuana and hashish, and a .357 magnum pistol and ammunition. The officers also found cocaine in a rolled up ten-dollar bill in petitioner's coat pocket. Petitioner was arrested and charged with possessing the cocaine, marijuana and hashish in a four-count indictment filed on November 28, 1978.[1]

Petitioner moved for an order to dismiss the indictment or to require specific performance of an alleged plea agreement whereby petitioner would be permitted to plead guilty to a misdemeanor.[2] On February 23, 1979, a hearing was held on this motion. Howard L. Cushenberry, an Assistant United States Attorney, testified at the hearing that prior to the indictment petitioner's attorney asked him whether petitioner could be allowed to plead guilty to a misdemeanor. Cushenberry replied that "we could explore those options * * * if [petitioner] would work with the government and perhaps give us the name of his source" (I Tr. 8-9).[3] Petitioner's attorney said he would "get back" to Cushenberry.

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[1] In addition to the three counts on which petitioner was convicted, he was also charged with possessing cocaine, in violation of D.C. Code Ann. § 33-402.

[2] Apparently, petitioner no longer seeks dismissal of the indictment (see Pet. i, 9).

[3] "I Tr." refers to the transcript of the February 23, 1979 hearing.

When Cushenberry did not hear from petitioner's attorney, Cushenberry telephoned him shortly before an indictment had to be filed and asked him whether petitioner was willing to cooperate. Petitioner's attorney replied that he had not "made up his mind." Cushenberry told petitioner's counsel that he would seek an indictment and that he should pursue any further discussions with the trial attorney to be assigned to the case (*id.* at 9-16). Thereafter petitioner was indicted.

Assistant United States Attorney David S. Krakoff, who had post-indictment responsibility for petitioner's case, also testified at the February 1979 hearing. He stated that on December 4, 1978, petitioner's attorney asked him if petitioner could be permitted to plead guilty to a misdemeanor in exchange for the name of his supplier. Krakoff replied that he would discuss the matter with his superiors. After conferring with his superiors, Krakoff told petitioner's attorney that providing the name of petitioner's supplier would not be sufficient cooperation (1 Tr. 20-22). On December 27, 1978, Krakoff told petitioner's attorney that a misdemeanor plea would be accepted if: (1) petitioner made a controlled purchase of narcotics from his supplier or another similarly situated supplier in order for the police to obtain an arrest or search warrant, and (2) petitioner testified before the grand jury. Petitioner's attorney did not accept or reject the offer, but instead arranged a meeting with petitioner and Krakoff to discuss the offer (*id.* at 25-26).

Krakoff further testified that on January 2, 1979, a meeting was held among himself, Sergeant Gonzalez and Detective Centrella of the Metropolitan Police Department, petitioner and his attorney. At the outset of the meeting, Krakoff advised petitioner of his rights and stated "that in no way could anything that he said be used against him" (1 Tr. 30, 35). Krakoff repeated the offer, including the two conditions that he had previously discussed with petitioner's

attorney (*id.* at 27, 29-30, 33-34). After petitioner conferred with his attorney, he told Krakoff that he would give him the name of his supplier. Krakoff replied "in no uncertain terms that that was not enough" and that the two stated conditions were essential to an agreement (*id.* at 35). Petitioner told Krakoff that his supplier was "Ed Green" who lived in New York City, and indicated that he was willing to appear before the grand jury (*id.* at 28-31). However, petitioner repeatedly refused to agree to participate in a controlled buy from a narcotics supplier because he allegedly did not know anyone engaged in narcotics trafficking. Moreover, petitioner said that "he couldn't even provide information about his supplier because his supplier knew that he had been arrested" (*id.* at 29-30, 34, 36-37, 39-40). Petitioner also stated that his possession of the four ounces of cocaine at issue was the only time he was involved in drug dealings (*id.* at 74).

Krakoff also testified that at the end of the January 2 meeting an agreement had not been reached; petitioner had not accepted the offer and was unwilling or unable to provide the information and cooperation that the government had sought in exchange for a misdemeanor plea (1 Tr. 28, 32, 37-38, 39-40, 51-52). Consequently, Krakoff told petitioner that he had 30 days to decide whether he was willing to accept the offer and to provide the requested information and cooperation (*id.* at 37, 39-40, 51-52).

On January 5, 1979, Krakoff told petitioner's attorney that the government had withdrawn its offer (1 Tr. 47). Krakoff explained that he withdrew the offer because he received new information from law enforcement officials on January 4, 1979, indicating that, contrary to petitioner's representation at the January 2 meeting, petitioner was heavily involved in illicit drug trafficking. Hence Krakoff and his superiors did not believe that a misdemeanor disposition was in the interest of justice (*id.* at 48, 70-71, 74).

In addition, Detective Gonzalez testified at the hearing that no one named "Ed Green" lived at the address petitioner gave Krakoff. Gonzalez also confirmed that at the January 2 meeting petitioner said he was unable to arrange a buy of cocaine similar to the four ounces he possessed from a "bona fide dope dealer" because he did not know any suppliers other than "Ed Green" from New York. Petitioner had stated "I don't know anybody and I can't do anybody, just a one-shot deal from New York" (I Tr. 63-66).

2. Following the hearing on petitioner's motion, the district court made written findings of fact and conclusions of law based generally on the testimony of the government witnesses (Pet. App. 1a-5a). In particular, the district court found that plea negotiations were conducted at the January 2, 1979, meeting, which was adjourned with the understanding that petitioner would be allowed to plead guilty to a misdemeanor if within 30 days he (1) participated in a controlled buy of illicit narcotics in the Washington, D.C., area from someone who sold illicit drugs comparable to that of his alleged New York supplier, and (2) testified before the grand jury. The court also found that on January 4, 1979, the prosecutor learned from other law enforcement officials that, at the January 2 meeting, petitioner did not accurately characterize his involvement in the drug trade. The court further concluded that on January 5, 1979, the prosecutor told petitioner's counsel that the plea offer made on January 2 was revoked, and that petitioner had not undertaken any action in performing the two pre-conditions to a plea agreement before the offer had been revoked.

Based on these and other factual findings, the district court held (Pet. App. 4a-5a) that petitioner had done nothing to perform the two pre-conditions under the offer and had not acted to his detriment in reliance on the plea offer. Hence,

the district court denied petitioner's requests for either specific performance of the offer or dismissal of the indictment. The district court also concluded that the discovery of information not known by the prosecutor when he extended the plea offer, which indicated that petitioner's representations at the January 2 plea negotiations were not entirely truthful, constituted an extenuating circumstance justifying revocation of the offer.

ARGUMENT

1. Petitioner contends (Pet. 6-8) that he "unequivocally accepted" the prosecutor's offer to plead guilty to a misdemeanor charge and relied on the plea agreement to his detriment by naming the source of his drugs and by waiving his Fifth Amendment privilege against compulsory self-incrimination and making incriminating statements during the January 2, 1979, meeting. Consequently, petitioner argues that the district court should be directed to order the government to abide by its original plea offer and that he is entitled to plead guilty to a misdemeanor. Petitioner's contentions are factually and legally erroneous.

At the outset, we note that petitioner did not detrimentally rely on the plea offer extended at the January 2 meeting. First, petitioner was advised at the meeting that whatever he said could not be used against him (see Fed. R. Crim. P. 11(e)(6)), and, indeed, his statements were not used against him at trial. Therefore, petitioner, who was not compelled to make any statements, did not in any event make statements that effectively incriminated himself; accordingly, he did not waive his Fifth Amendment privilege to his detriment. Moreover, petitioner did not name his source as a product of, or in reliance upon, a consummated plea agreement. Rather, petitioner "named" his drug supplier in the course of preliminary negotiations in an effort to obtain a plea agreement. As the district court found, the

January 2 plea discussion meeting ended with the understanding that petitioner had 30 days to accept the prosecutor's offer by performing two conditions: (1) participate in a controlled narcotics buy, and (2) appear before the grand jury. The district court properly found that before the government revoked its offer petitioner had done nothing to perform these two conditions and had not acted to his detriment in reliance upon the offer. Hence, the record clearly shows that, contrary to petitioner's allegations, he had neither manifested his acceptance of the offer nor detrimentally relied on it. The district court's findings, which were affirmed by the court of appeals, are thus well supported in the record and do not warrant further review by this Court.

Furthermore, where, as here, the defendant does not act in reliance upon a prosecutor's plea offer and does not otherwise suffer substantial and irreparable harm, the prosecutor is free to withdraw his plea offer. See, *e.g.*, *United States* v. *Ocanas*, 628 F. 2d 353, 357-358 (5th Cir. 1980), petition for cert. pending, No. 80-1308 (filed Jan. 16, 1981); *Roe* v. *United States Attorney*, 618 F. 2d 980, 982 (2d Cir. 1980); *Government of the Virgin Islands* v. *Scotland*, 614 F. 2d 360, 363-365 (3d Cir. 1980); *State* v. *Edwards*, 279 N.W. 2d 9, 11 (Iowa 1979); *State ex rel. Gray* v. *McClure*, 242 S.E.2d 704, 707 (W.Va. 1978); *Shields* v. *State*, 374 A.2d 816, 818-820 (Del.), cert. denied, 434 U.S. 893 (1977); *People* v. *Heiler*, 79 Mich. App. 714, 262 N.W. 2d 890 (1977); *Wynn* v. *State*, 22 Md. App. 165, 172, 322 A.2d 564, 568 (1974); Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Calif. L. Rev. 471, 525 n.189 (1978). Here, moreover, the prosecutor's decision to withdraw the plea offer was motivated by a change in circumstances (newly discovered evidence) and petitioner's failure to cooperate in good faith. Accordingly, petitioner is plainly not entitled to specific performance of the plea offer.

Petitioner's reliance (Pet. 7) on *Santobello* v. *New York*, 404 U.S. 257 (1971), is misplaced. In that case, the defendant pleaded guilty on the condition that the prosecutor would make no recommendation as to his sentence. At sentencing, however, a new prosecutor recommended that the court impose the maximum sentence. This Court held that the State had violated the defendant's rights, because the Due Process Clause requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. Here, in contrast, petitioner never accepted or relied upon the plea offer in question, much less actually entered a plea of guilty based on a specific plea agreement. Nothing in the *Santobello* decision suggests that a defendant is entitled to specific performance of such an unaccepted and unconsummated plea offer.

Likewise, petitioner erroneously argues (Pet. 7-8) that the decision below is in conflict with the Fourth Circuit's decision in *Cooper* v. *United States*, 594 F. 2d 12 (1979). In *Cooper*, the Assistant United States Attorney proposed a plea agreement and stated that the offer would remain open for one week. The defendant's counsel immediately informed the defendant of the offer, and the defendant unequivocally agreed to accept it. The same afternoon the defendant's counsel called the AUSA to inform him of the defendant's agreement to the terms of the offer. In the interim, however, the AUSA had met with his superiors and had been instructed to withdraw the offer, which he did in the course of the telephone call from the defendant's counsel. The court of appeals held that notwithstanding the absence of "tangible 'detrimental; reliance' by the defendant" (*id.* at 16), the government's conduct violated his rights

under the Due Process Clause and the Sixth Amendment.[4] The court emphasized that its ruling was predicated on certain "crucial" facts, including the unconditional nature of the plea proposal, the defendant's prompt and unequivocal acceptance of the plea terms, and the absence of any "extenuating circumstances affecting the government's or any public interest that were unknown when the proposal was extended." 594 F. 2d at 19. See also *United States* v. *McIntosh*, 612 F. 2d 835, 837 (4th Cir. 1979) (*Cooper* decision limited to situation where defendant personally accepts an offer before its withdrawal).

Although we believe that the *Cooper* decision is wrong (see, *e.g.*, *Government of the Virgin Islands* v. *Scotland*, *supra*), it does not conflict with the decision of the court of appeals in this case. The plea proposal at issue here was expressly conditioned on two requirements. Petitioner never performed those conditions, expressed his willingness to participate in a controlled sale of narcotics, or otherwise unequivocally accepted the plea proposal. Compare 594 F. 2d at 15, 19 with Pet. App. 4a-5a. In addition, here, unlike in *Cooper*, there are extenuating circumstances warranting the withdrawal of the plea offer: Subsequent to the plea offer, the prosecutor received new information demonstrating that petitioner had made misleading statements at the January 2 plea negotiation session and that a misdemeanor plea would not serve the public interest.

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[4]In the court of appeals' view, the government's conduct could have adversely affected the defendant's confidence in his counsel. Compare *Government of the Virgin Islands* v. *Scotland*, *supra*, 614 F. 2d at 363 ("We do not find that the sixth amendment right to effective counsel is implicated in this unconsummated plea bargain situation"). But even assuming that the government's behavior in *Cooper* somehow trenched upon the defendant's Sixth Amendment right to counsel, here petitioner was present during the plea negotiations and thus could not have drawn any adverse inferences about the reliability of his counsel from the government's withdrawal of the plea offer.

2. Petitioner also contends (Pet. 5, 8-9) that the district court's decision is erroneously predicated on its improper *in camera* review of certain documents. These documents were notes taken by AUSA Krakoff and D.C. Detective Centrella of their post-January 2 conversations with other law enforcement officials regarding petitioner's involvement in the drug trade. At the outset, we note that the district court did not refer to these notes in its opinion, which is amply supported in all respects by the consistent testimony of the several government witnesses. Indeed, the district court stated at the December 21, 1979, sentencing proceeding that it could not remember whether it had in fact looked at these notes (Dec. 21, 1979 Tr. 20-22). Moreover, contrary to petitioner's assertion that the court made an *in camera* inspection "[o]ver repeated defense objections" (Pet. 5), the court examined these notes at the *express request* of petitioner.[5] Accordingly, petitioner may not now be heard to complain.

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[5]The district court refused to disclose the written notes to petitioner's attorney on the ground that such disclosure would jeopardize an ongoing criminal investigation (1 Tr. 48, 70-74, 79-80, 88-89, 91-92). The court initially directed that the notes be sealed, stating (*id.* at 89; emphasis supplied):

> *I don't want to see them.* I said you will seal them, file them, put them in the record. *I am not going to look at them.* Seal the notes and put them in the record and if we get reversed for some reason or another and then they want me to look at them then I will call you in and you can interpret your notes.

Thereafter, however, petitioner's attorney stated to the court (*id.* at 103; emphasis supplied):

> The only thing I want to suggest to Your Honor is that I think that for Your Honor to rule in this matter, rather than have these things [the notes] simply sealed for the Court of Appeals, *I would request Your Honor to examine then in camera* so that Your Honor can have some sense of whether or not that type of information and the source from which it came was the sort of thing

In any event, the district court properly undertook to review these notes *in camera* and correctly declined to disclose them to the defendant at his pretrial hearing. These notes reflect privileged details of a then ongoing investigation and do not relate to petitioner's guilt or innocence on the charges in this case. Furthermore, inspection of these notes was not critical to his plea bargain claim; petitioner was fully able to question the various government witnesses about the general susbstance of these notes. In fact, although petitioner had an opportunity following his convictions to cross-examine the DEA agent who was familiar with this investigation and to inspect the notes in question (Dec. 21, 1979 Tr. 5-10, 16-17; Jan. 25, 1980 Tr. 4), [6] petitioner does not claim that any information in those notes contradicted the testimony of the government agents at the pretrial hearing and does not otherwise explain with specificity how these notes might have affected the district court's decision. In these circumstances, the district court's treatment of the privileged notes was not an abuse of discretion. See, *e.g.*, *Kerr* v. *United States*, 426 U.S. 394, 405-406 (1976); *United States* v. *Nixon*, 418 U.S. 683, 706, 714-715 (1974); *McCray* v. *Illinois*, 386 U.S. 300, 305-314 (1967); *Dennis* v. *United States*, 384 U.S. 855, 875 (1966); *Roviaro* v. *United States*, 353 U.S. 53 (1957).

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which could have readily been obtained by a telephone call to these individuals * * *.

The court then stated that it would examine the notes *in camera* unless there were any objections; neither petitioner's attorney nor government counsel objected (*id.* at 112).

[6]The record reflects that petitioner chose not to question the DEA agent. It does not show whether petitioner in fact inspected the notes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

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